

"Brady Information" from
Federal Criminal Discovery

Brady Information

Since the Supreme Court's 1963 decision in *Brady v. Maryland*,¹ it has been fundamental to our system of criminal justice that the government must disclose information to the accused that is favorable and material either to guilt or punishment. Properly applied, the *Brady* rule means that a defendant will not be convicted unfairly on the basis of an incomplete picture of the evidence, one that omits exculpatory information that the government had but the defense did not.

This aspiration is clear enough, and unassailable in principle. But with many constitutional rules, applying *Brady* to particular cases often proves more controversial, and indeed, the rule has been the subject of several significant divided opinions in the Supreme Court. It is settled that a *Brady* violation occurs if the following three elements are satisfied. The information must be favorable to the defendant. It must have been in the government's possession and withheld from the defense. And, it must be "material" to guilt or sentencing, that is, sufficiently important that its suppression undermines confidence in the outcome. Whether the prosecutor withheld the information intentionally or not does not matter, though it may affect whether the court decides to impose a punitive sanction. Either way, if these three elements are satisfied, there is a due process violation and the defendant should receive a new trial.

Brady is a constitutional requirement of due process, and no statute or rule defines its contours. Accordingly, while *Brady*'s basic contour

1. 373 U.S. 83 (1963).

are well accepted and understood, its details are a creature of decisional law. In addition, the *Brady* elements are highly fact-dependent and usually demand a detailed analysis of how the withheld information fits into the evidence at trial. For these reasons, the best way to understand the *Brady* rule, we think, is to review its history through the Supreme Court cases that discuss and apply the rule.

This chapter begins by analyzing the *Brady* decision itself and the Supreme Court's decisions interpreting the *Brady* rule. We then discuss the three elements of a *Brady* violation. We also discuss other limitations that may apply to claims of *Brady* violations. Finally, we address practical and procedural issues that often arise for judges and lawyers facing *Brady* issues, especially at the trial court level.

A. The Supreme Court Cases

We begin by tracing the development of the *Brady* rule through its history in the Supreme Court. Each of the most significant cases is discussed in detail. We touch briefly on the less significant cases as well.

1. *Brady v. Maryland* (1963): Evidence Favorable to the Defense and Material to Either Guilt or Punishment Must Be Disclosed

The State of Maryland charged John Brady and Donald Boblit with murder while committing a robbery. The state sought the death penalty. Under the law of felony murder in Maryland, if Brady participated in the robbery that led to the murder, he was criminally liable for the murder even if he did not do the actual killing. The trial court tried Brady and Boblit separately. Brady testified at his trial and admitted that he participated in the crime, but claimed that Boblit actually killed the victim. In closing argument, Brady's counsel conceded that Brady was guilty of felony murder, but argued that Brady should be spared the death penalty because he did not actually kill the victim. The jury disagreed and rendered a verdict for Brady to be punished by death.

Before trial, Brady's counsel had asked the state to disclose all statements made by Boblit. The government disclosed several of Boblit's statements, but failed to disclose his admission that Boblit himself had killed

the victim. Brady did not learn about the undisclosed admission until after his original appeal had failed. He filed a petition for post-conviction relief in Maryland state court that was denied, and he appealed from the Maryland state court system to the U.S. Supreme Court.

The Supreme Court did not disturb the guilty verdict. Brady, after all, had confessed to participating in the underlying robbery and was therefore guilty of felony murder under Maryland law. But the Supreme Court remanded the case for reconsideration of Brady's sentence in light of Boblit's previously undisclosed admission that Boblit had actually killed the victim.² In doing so, the Court announced a new rule of due process: "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."³ The Court explained:

Society wins not only when the guilty are convicted, but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: "The United States wins its point whenever justice is done its citizens in the courts." A prosecution that withholds evidence on demand of an accused which, if made available would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice...⁴

On remand, the State of Maryland commuted Brady's sentence to life, and he was eventually released on parole.⁵

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2. The factual recitation in the Supreme Court's *Brady* opinion is rather spare. For a comprehensive treatment of the facts of the *Brady* case, see Richard Hammer, *Between Life and Death* (1969).

3. 373 U.S. at 87.

4. 373 U.S. at 87-88 (citation and footnote omitted).

5. *Criminal Procedure Stories* (Carol S. Steiker ed. 2006).

The Supreme Court has addressed and expanded upon the fundamental principle of *Brady*—that due process requires disclosure of exculpatory evidence material to guilt or punishment—in eleven subsequent cases, arising from both federal and state trials. Because it stems from the Due Process Clauses of the Fifth and Fourteenth Amendments, the *Brady* rule is the same in both federal and state cases.⁶ Not all of the Supreme Court cases require lengthy discussion. Below, we devote significant attention to the four post-*Brady* decisions that added substantially to an understanding of the rule, and we touch briefly on the others.

2. *Giglio v. United States* (1972): Evidence Affecting Credibility Falls Within the *Brady* Rule

The Supreme Court made clear in *Giglio v. United States*⁷ that “evidence favorable to an accused” includes evidence that would impeach the credibility of government witnesses. John Giglio was convicted of passing forged money orders. The “key witness” was Giglio’s alleged co-conspirator, Robert Taliento, who testified that he had received no promises in exchange for his testimony and that he, like Giglio, could be prosecuted for passing forged money orders. In fact, one of the prosecutors⁸ had promised Taliento that he would not be prosecuted. This was not disclosed to defense counsel until after trial. The *Giglio* Court held that the government should have told the defense about this promise. “When the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within th[e] general rule [of *Brady*].”⁹

It was significant to the *Giglio* Court that Taliento testified falsely. In addition to *Brady*, the Court relied on *Napue v. Illinois*¹⁰ for the

6. *United States v. Agurs*, 427 U.S. 97, 107 (1976).

7. 405 U.S. 150 (1972).

8. The original prosecutor who made the promise was not in fact the prosecutor who tried the case. There was a dispute over whether the original prosecutor advised the trial prosecutor of the promise. There was no dispute that the original prosecutor had in fact promised Taliento that he would not be prosecuted.

9. 405 U.S. at 154.

10. 360 U.S. 264 (1959).

proposition that a prosecutor's failure to correct false testimony can violate due process. *Napue* required a new trial if "the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury."¹¹ The Supreme Court had little difficulty concluding that a promise not to prosecute the key witness could have affected the judgment of the jury. But as we shall see, importing the "reasonable likelihood" language from *Napue* into the *Brady* line of cases has been a source of confusion over the years.

3. *United States v. Agurs* (1976): The Government's Failure to Disclose Immaterial Information Will Not Lead to Reversal

In *Moore v. Illinois*,¹² and more significantly, *United States v. Agurs*,¹³ the Court grappled with the materiality component of the *Brady* rule. In *Moore*, the defendant claimed that the government should have disclosed that the police originally suspected that somebody else, named "Slick," was the perpetrator and that a witness to whom the defendant allegedly confessed his guilt originally identified Slick as the person who confessed. The Court also considered whether the government should have disclosed a diagram of the crime scene drawn by an eyewitness. In a 5-4 decision, the majority found that "the background presence of the elusive 'Slick,' while somewhat confusing, is at most an insignificant factor."¹⁴ There were two eyewitnesses to the murder who positively identified the defendant, and other witnesses testified that the defendant confessed to them. The Court also found that the diagram did not in fact contradict the government's trial evidence. The four dissenters argued that the undisclosed information might have helped the defense and therefore was material.

In *Agurs*, the Supreme Court made explicit that the government's failure to produce evidence that would not have had any effect on the

11. 405 U.S. at 154 (alteration in original) (quoting *Napue*, 360 U.S. at 271).

12. 408 U.S. 786 (1972). *Moore* was a capital case in which the death penalty was imposed. The imposition of the death penalty in *Moore* was reversed based on the holding of *Furman v. Georgia*, 408 U.S. 238 (1972), decided the same day as *Moore*.

13. 427 U.S. 97 (1976).

14. *Moore*, 408 U.S. at 798.

result of the underlying trial does not violate *Brady*. The defendant was charged with murdering her victim by stabbing him in a motel room. Her theory at trial was self-defense. It was undisputed that the victim was carrying two knives, which supported the self-defense theory. But the defendant herself had no injuries, while the victim had several stab wounds in the chest and defensive wounds to his hands.

The defense learned after trial that the victim had a criminal record, including an assault conviction and a weapons conviction. The defense had not asked for the victim's criminal record at trial. The trial judge found that disclosure of the victim's criminal record would not have made any difference and declined to disturb the jury's verdict. The U.S. Court of Appeals for the D.C. Circuit disagreed, holding that the victim's criminal record was material because if the jury had known of the victim's criminal record, the jury "might" have acquitted.

The Supreme Court reversed and reinstated the verdict, holding that the trial judge properly concluded that the undisclosed information was not material. In particular, the Supreme Court found the fact that the defendant herself had no injuries to be inconsistent with her claim of self-defense. The Court also found that the new information did not contradict anything offered by the prosecutor and did not add significantly to the defense evidence, because it was undisputed that the victim had two knives. The *Agurs* court had this to say about materiality:

The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.¹⁵

15. 427 U.S. at 112-13 (footnotes omitted).

The Court recognized that the materiality of evidence cannot always be anticipated prior to trial. While it declined to impose a different constitutional standard for pretrial disclosure,¹⁶ the Court admonished prosecutors to disclose potentially significant information.

[T]here is a significant practical difference between the pre-trial decision of [a] prosecutor and the post-trial decision of the judge. Because we are dealing with an inevitably imprecise standard, and because the significance of an item of evidence can seldom be predicted accurately until the entire record is complete, the prudent prosecutor will resolve doubtful questions in favor of disclosure.¹⁷

Aside from what it had to say about materiality, the *Agurs* decision is instructive in other ways as well. Recall that the holding of *Brady* appeared to require that the defense request exculpatory information before the failure to produce it could be considered a due process violation.¹⁸ Although the *Agurs* Court found it significant that the defendant did not ask for the victim's criminal record, it also suggested that a *Brady* violation could be found even in cases where the defense did not ask for information: "[T]here are situations in which evidence is obviously of such substantial value to the defense that elementary fairness requires it to be disclosed even without a specific request."¹⁹ This language laid the groundwork for the Court's later clarification that the government's duty to produce *Brady* information exists regardless of whether the defense asks for it.

16. 427 U.S. at 108 ("Logically the same standard [of materiality] must apply [before trial and after trial]. For unless the omission deprived the defendant of a fair trial, there was no constitutional violation requiring that the verdict be set aside and absent a constitutional violation, there was no breach of the prosecutor's constitutional duty to disclose.").

17. 427 U.S. at 108.

18. *Brady*, 373 U.S. at 87 ("We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." (emphasis added)).

19. 427 U.S. at 110.

Agurs also made clear, however, that requests can matter and that a prosecutor should not ignore them. "When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable."²⁰

Finally, *Agurs* holds that a *Brady* violation does not turn on the good faith or bad faith of the prosecutor. "If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor."²¹

4. *United States v. Bagley* (1985): Material Undisclosed Evidence Is Evidence that Undermines Confidence in the Outcome of the Trial

The Supreme Court again explored the materiality requirement in *United States v. Bagley*.²² That case produced a majority opinion holding that a new trial was required, but a fragmented set of opinions regarding materiality. Five of the eight justices who participated agreed on the appropriate standard for materiality: A new trial is required "if there is a reasonable probability that . . . the result of the proceeding would have been different" had the exculpatory information been disclosed for use at trial.²³ Justice White, joined by Chief Justice Burger and then-Justice Rehnquist, stated in a concurring opinion that the "reasonable probability" standard was flexible and saw no need to elaborate further.²⁴ Justice Blackmun, joined by Justice O'Connor, found it appropriate to explain that a "reasonable probability" means "a probability sufficient to undermine confidence in the outcome."²⁵ Justices Marshall, Brennan, and Stevens dissented, arguing for a more favorable standard for the defendant.²⁶

20. *Id.* at 106.

21. *Id.* at 110.

22. 473 U.S. 667 (1985).

23. *Id.* at 683 (opinion of Blackmun, J., joined by O'Connor, J.), 685 (White, J., concurring in part and concurring in the judgment, joined by Rehnquist, J.) (quotation marks omitted).

24. *Id.*

25. 473 U.S. at 682 (emphasis added) (quotation marks omitted).

26. See *id.* at 685-709 (Marshall, J., dissenting, joined by Brennan, J.), 709-15 (Stevens, J., dissenting).

Hughes Bagley was convicted of narcotics offenses in a bench trial. In response to a discovery motion, the government submitted affidavits from its two principal witnesses stating that they had not been rewarded for their testimony. Information obtained after trial through the Freedom of Information Act disclosed that the government had, in fact, entered into written agreements to give the witnesses cash rewards. The trial judge, who had also sat as the finder of fact in the bench trial, "found beyond a reasonable doubt . . . that had the existence of the agreements been disclosed to [the court] during trial, the disclosure would have had no effect" on the judge's finding of guilt.²⁷

The U.S. Court of Appeals for the Ninth Circuit reversed on the theory that the defendant's Sixth Amendment right of effective cross-examination had been denied. The Court of Appeals treated impeachment evidence as constitutionally different from other exculpatory evidence. It reasoned that failure to disclose impeachment evidence is "even more egregious" than failure to disclose other exculpatory evidence "because it threatens the defendant's right to confront adverse witnesses."²⁸

The Supreme Court rejected the Ninth Circuit's distinction between "impeachment evidence" and "exculpatory evidence,"²⁹ but it nonetheless found a "significant likelihood that the prosecution's response to respondent's discovery motion misleadingly induced defense counsel to believe that [the witnesses] could not be impeached on the basis of bias or interest arising from inducements offered by the [prosecutor]."³⁰ The Supreme Court therefore remanded the case to the Court of Appeals "for a determination whether there [was] a reasonable probability that, had the inducement offered by the Government to [the government's principal witnesses] been disclosed to the defense, the result of the trial would have been different."³¹ Applying the Supreme Court's test on remand, the Ninth Circuit vacated Bagley's conviction.³²

27. 473 U.S. at 673.

28. 719 F.2d 1462 (9th Cir. 1983), *rev'd*, 473 U.S. 667 (1985).

29. 473 U.S. at 676.

30. *Id.* at 683.

31. *Id.* at 684.

32. *Bagley v. Lumpkins*, 798 F.2d 1297 (9th Cir. 1986).

Justice Blackmun, joined by Justice O'Connor, engaged in a lengthy discussion of *Brady*'s materiality standard, a discussion that was essentially adopted eleven years later in the Supreme Court's next *Brady* case, to which we now turn.

5. *Kyles v. Whitley* (1995): The Court Refines the Materiality Standard and Applies It in a Fact-Intensive Analysis

*Kyles v. Whitley*³³ stands as perhaps the Supreme Court's most important statement about the *Brady* rule since *Brady* itself. *Kyles* was a murder case in which the government failed to disclose that its witnesses had given inconsistent statements. Some of the evidence favorable to the defense apparently was not disclosed to the prosecutor himself until after trial.

As an initial matter, Justice Souter's opinion for the Court cited *Bagley* for the proposition that it does not matter whether the defense has asked for the information. "[R]egardless of request," the Court held, favorable evidence is material and constitutional error results from its suppression "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result . . . would have been different."³⁴ Although we do not read this in *Bagley*, after *Kyles* there is little doubt that a request from the defense is not necessary to trigger a violation of the *Brady* rule.³⁵

The *Kyles* Court emphasized four aspects of the materiality inquiry. First:

a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal (whether based on the presence of reasonable doubt or acceptance of an explanation for the crime that does not inculcate the

33. 514 U.S. 419 (1995).

34. *Id.* at 433-34 (quotation marks omitted).

35. Nonetheless, as a matter of good practice, and to maximize the likelihood of receiving exculpatory information, we believe that defense lawyers should request that the government produce all *Brady* information, including specific categories of information that counsel believes may exist.

defendant). . . . *Bagley's* touchstone of materiality is a "reasonable probability" of a different result, and the adjective is important. *The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial."*³⁶

This is the heart of it and bears repeating: A *Brady* violation occurs when the failure to disclose evidence "undermines confidence in the outcome of the trial."

Second, a sufficiency of the evidence test is not the proper test under *Brady*. That is, "[a] defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict. The possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary basis to convict."³⁷

Third, once a *Brady* violation has been found, there is "no need for further harmless-error review."³⁸ A *Brady* error "cannot subsequently be found harmless."³⁹ In short, the materiality test takes the place of any harmless error analysis that might otherwise apply.⁴⁰

Fourth, undisclosed evidence is to be "considered collectively, not item by item."⁴¹ In other words, a piece of information cannot be viewed in isolation and, even if that information might by itself be immaterial, it can require a new trial if, in combination with other undisclosed items, its suppression undermines confidence in the outcome of the trial. This has significant implications for the duties of prosecutors.

36. 514 U.S. at 434 (emphasis added) (citations omitted).

37. *Id.* at 434-35.

38. *Id.* at 436.

39. *Id.*

40. *Id.* at 435.

41. *Id.* at 436.

[T]he prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of "reasonable probability" is reached. This in turn means that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police.⁴²

Echoing the Court's prior admonition in *Agurs*, the *Kyles* Court continued, "[t]his means, naturally, that a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence. This is as it should be."⁴³ Thus, the prosecution's disclosure of evidence favorable to the defense "will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations."⁴⁴

The Supreme Court then dived into the facts of the case to determine whether the late-disclosed evidence undermined confidence in the outcome of the trial. The theory of the defense was that Kyles had been framed by an informer named "Beanie." Beanie had told inconsistent stories about the murder to the police and prosecutor, but the state did not disclose these inconsistent stories to the defense. Nor did the state disclose that two other government witnesses had also given inconsistent accounts of what had happened. The first trial ended in a hung jury. Beanie told the state yet another inconsistent story between the first and second trials. The state again did not disclose Beanie's inconsistencies to the defense. The second trial ended in conviction. The Supreme Court held that its confidence in the outcome of the trial was undermined by the failure to disclose the inconsistent statements and remanded the case for a new trial.

Justice Scalia authored a stinging dissent, calling the defense theory "stupid" and criticizing the majority for deciding the merits of the case.⁴⁵ Justice Stevens responded, in a concurring opinion, that "busy

42. *Id.* at 437.

43. *Id.* at 439 (citation omitted).

44. *Id.* at 440.

45. *Id.* at 461 (Scalia, J., dissenting).

judges" are occasionally required to engage in a "detailed review of the particular facts of a case."⁴⁶

After remand from the Supreme Court, Kyles was tried three more times. In each of the three retrials, the defense was able to use the witnesses' inconsistent statements, and the jury was unable to reach a verdict. The state ultimately agreed to release Kyles from custody and did not try him again.⁴⁷

6. *Brady* in the Supreme Court Since *Kyles*

In the sixteen years since *Kyles*, the Supreme Court has decided six more *Brady* cases. These have not changed or added much to the core principles, but they help in understanding how the Court approaches *Brady* claims. Several of these cases turned on the materiality component of the rule.

In *Wood v. Bartholomew*,⁴⁸ the Supreme Court held that a witness's failed polygraph result did not have to be disclosed under *Brady*. First, all agreed that the polygraph result itself was not admissible under the law of the state of Washington, where the underlying trial took place. Second, the result of the polygraph did not undermine the Court's confidence in the outcome of the case. The Supreme Court found that the proof against the defendant was "overwhelming" and that the defendant's defense was implausible.⁴⁹

In *Strickler v. Greene*,⁵⁰ the Supreme Court again delved deeply into the facts in reviewing a capital murder case in which the State failed to produce inconsistent statements of one of its witnesses. In *Strickler*, however, there was "considerable forensic and other physical evidence linking petitioner to the crime,"⁵¹ a murder committed by beating the head of the victim with a 67-pound rock. The Court found that "[t]he record provides strong support for the conclusion that petitioner would

46. *Id.* at 455 (Stevens, J., concurring).

47. Like the *Brady* case, a book has been written on the *Kyles* case. See Jed Home, *Desire Street* (2005).

48. 516 U.S. 1 (1995).

49. *Id.* at 8.

50. 527 U.S. 263 (1999).

51. *Id.* at 298.

have been convicted of capital murder and sentenced to death, even if [the witness at issue] had been severely impeached."⁵² The Supreme Court upheld the conviction and the Commonwealth of Virginia executed Thomas Strickler about a month later.

Justice Souter concurred in part and dissented in part. Justice Souter had no doubt that the defendant was guilty of murder, but his confidence in the death sentence was undermined by the undisclosed evidence. In an interesting passage, Justice Souter described the confusion that had enveloped the materiality standard ever since the *Giglio* Court in 1972 quoted the "reasonable likelihood" standard from *Napue v. Illinois*,⁵³ which by the time of *Bagley*,⁵⁴ was described as the "reasonable probability" standard.

The Court speaks in terms of the familiar, and perhaps familiarly deceptive, formulation: whether there is a "reasonable probability" of a different outcome if the evidence withheld had been disclosed. The Court rightly cautions that the standard intended by these words does not require defendants to show that a different outcome would have been more likely than not with the suppressed evidence, let alone that without the materials withheld the evidence would have been insufficient to support the result reached. Instead, the Court restates the question (as I have done elsewhere) as whether "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence" in the outcome. Despite our repeated explanation of the shorthand formulation in these words, the continued use of the term "probability" raises an unjustifiable risk of misleading courts into treating it as akin to the more demanding standard, "more likely than not."⁵⁵

Justice Souter suggested that the Court should in the future use the term "significant possibility," which he thought "would do better at capturing the degree to which the undisclosed evidence would place the

52. *Id.* at 294.

53. 360 U.S. 264, 271 (1959).

54. 473 U.S. 667.

55. *Strickler*, 527 U.S. at 297-98 (citations omitted).

actual result in question, sufficient to warrant overturning a conviction or sentence."⁵⁶

Four years later,⁵⁷ the Court decided *Banks v. Dretke*,⁵⁸ a capital murder case arising on habeas corpus review from Texas. Prosecutors advised defense counsel at trial that there would be no need to litigate discovery issues because the state would provide the defense with all the discovery to which it was entitled. Nevertheless, state prosecutors withheld evidence that would have allowed the defendant to discredit the prosecutor's two key witnesses. The state did not disclose that one of those witnesses was a paid police informant. And, the state did not disclose that another witness had been extensively coached by police and prosecutors. The defense did not learn of the withheld evidence until federal habeas corpus review. After an intensive review of the facts, the Supreme Court found that the undisclosed information was material and remanded the case. The *Banks* Court reiterated that the materiality standard is met when "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."⁵⁹

Finally, in *Cone v. Bell*,⁶⁰ the Court again found that a death sentence was tainted by *Brady* violations. Gary Cone killed two people after robbing a jewelry store. His defense in Tennessee state court was insanity. He claimed that he was addicted to drugs, which caused amphetamine

56. *Id.* at 298 (quotation marks omitted).

57. In the meantime, the Court had held, in *United States v. Ruiz*, 536 U.S. 622 (2002), that a defendant could waive the "right to receive from prosecutors exculpatory impeachment material—a right that the Constitution provides as part of its basic 'fair trial guarantee.'" *Id.* at 628. Accordingly, the prosecution had no obligation to provide such evidence to the defendant before he decided to accept the plea. The Court reached the same conclusion with respect to information regarding affirmative defenses. By limiting its holding to these forms of exculpatory evidence, the Court arguably revived, by negative implication, a distinction between so-called exculpatory evidence and so-called exculpatory impeachment evidence that had been rejected by the Supreme Court in *Bagley*. See 473 U.S. at 674–75 (rejecting the proposition that a different standard applies under *Brady* when the undisclosed evidence could be used to cross-examine a witness). *Ruiz* is discussed in more detail below, in section E.5 of this chapter.

58. 540 U.S. 668 (2004).

59. 540 U.S. at 698 (quotation marks omitted).

60. 129 S. Ct. 1769 (2009).

psychosis. The state argued that Cone was not addicted to drugs. The jury returned verdicts for guilt and punishment by death. Ten years later, Cone learned that the state had withheld police documents and witness statements suggesting that he was in fact addicted to drugs. As in prior *Brady* cases, the Supreme Court reviewed the facts in detail, and it concluded that the withheld evidence did not undermine confidence in the jury's finding of guilt. But, the Court separately considered whether the evidence may have been material to sentencing. "Evidence that is material to guilt will often be material for sentencing purposes as well; the converse is not always true, however, as *Brady* itself demonstrates."⁶¹ "There is a critical difference between the high standard Cone was required to satisfy to establish insanity as a defense on the issue of guilt or innocence as a matter of Tennessee law and the far lesser standard that a defendant must satisfy to qualify evidence as mitigating in a penalty hearing in a capital case."⁶² The Supreme Court remanded the case to the federal trial court for a full assessment of the effect that the withheld evidence might have had on sentencing.⁶³

Though precision is elusive in describing materiality, the essence of the test is that the suppressed information must "undermine confidence in the outcome of the trial." *Brady* is ultimately about fairness, and the "undermines confidence" test asks whether the result was fair.

7. *Youngblood v. West Virginia* (2006): Summarizing *Brady* Law

One last Supreme Court decision merits brief discussion. In *Youngblood v. West Virginia*, the West Virginia Supreme Court failed to address the defendant's claim that he was entitled to a new trial because the state suppressed an exculpatory note written by an alleged victim. Without ruling on the merits, the Supreme Court remanded the case for the West Virginia Supreme Court to address the *Brady* issue and, in the process, summarized nicely the law of *Brady*:

61. *Id.* at 1784.

62. *Id.* at 1785.

63. *Id.* at 1786.

A *Brady* violation occurs when the government fails to disclose evidence materially favorable to the accused. This Court has held that the *Brady* duty extends to impeachment evidence as well as exculpatory evidence, and *Brady* suppression occurs when the government fails to turn over even evidence that is "known only to police investigators and not to the prosecutor." "Such evidence is material 'if there is a reasonable possibility that, had the evidence been disclosed to the defense, the result of the proceeding would have been different,'" although a "showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal." The reversal of a conviction is required upon a "showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."⁶⁴

B. The Three Elements of a Brady Violation

The Supreme Court cases make clear that there are three elements of a *Brady* violation:

1. The information must be favorable to the accused.
2. That information must have been suppressed by the government, either willfully or inadvertently.
3. Prejudice must have ensued—in other words, the suppression of information must undermine confidence in the outcome.⁶⁵

We review each of these elements in turn.

1. Favorable to the Accused

The first element, that the information be favorable or exculpatory to the defendant, is not a difficult hurdle to overcome. The court need only find that the information would have aided the defendant's case in some

64. *Youngblood v. West Virginia*, 547 U.S. 867, 869–70 (2006) (per curiam) (citations omitted).

65. *Banks*, 540 U.S. at 691 (citing *Strickler*, 527 U.S. at 281–82).

way. It does not matter how or (for purposes of this first element) how much.

a. "Exculpatory" information versus "impeachment" information.

The Supreme Court cases generally teach that there is no meaningful distinction between so-called impeachment evidence and so-called exculpatory evidence. Evidence that may impeach a government witness is merely one kind of exculpatory evidence. Indeed, experienced judges and lawyers understand that in many cases, impeachment evidence can be the most important evidence for the defendant. More than that: Sometimes impeaching the government's witnesses is the defense. "The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend."⁶⁶

The Supreme Court in *Bagley* rejected the Ninth Circuit's distinction between exculpatory information and favorable impeachment information.⁶⁷ But in *United States v. Ruiz*, the Supreme Court held that the defendant is not entitled to receive favorable impeachment evidence before entering a guilty plea. The Court reached the same conclusion with respect to evidence relating to affirmative defenses but did not address other kinds of exculpatory evidence, which may implicitly support the notion that there is a difference between impeachment and other "exculpatory" evidence for this purpose.⁶⁸ A number of local rules⁶⁹ and Department of Justice policies⁷⁰ also distinguish between exculpatory evidence and impeachment evidence, particularly in connection with setting deadlines for producing *Brady* information.

We have difficulty understanding the difference. As the Supreme Court stated in *Giglio*, "[W]hen the reliability of a given witness may well be determinative of guilt or innocence, non-disclosure of evi-

66. *Napue*, 360 U.S. at 269.

67. See *supra* text accompanying note 29.

68. See *supra* note 57; *infra* section E.5.

69. See *infra* chapter 11.

70. See *infra* chapter 8.

dence affecting credibility falls within th[e] general rule [of *Brady*]."⁷¹ Impeachment evidence is a form of exculpatory evidence, and our system of justice would be better served by treating them the same way.

b. "Brady material" versus "Brady information."

Lawyers and judges often refer to the suppression of "*Brady material*." This can be misleading, because it suggests that the government's duty under *Brady* extends merely to documents and tangible objects. Certainly such items meeting the elements of the *Brady* rule must be produced to the defense, but *Brady* is not limited to tangible things. Rather, the government's *Brady* obligation extends to all information, whether or not it has been reduced to writing. This includes, for example, oral statements of witnesses that government agents know but have not written down. Thus, the government cannot avoid its *Brady* obligations by choosing not to memorialize favorable information in writing.⁷² Judges, lawyers, and law enforcement alike should use the term "*Brady information*" instead of "*Brady material*."

c. Inadmissible evidence may be producible under Brady.

Favorable information is not limited to admissible evidence. Rather, information can be favorable if it could reasonably lead to admissible evidence. As in any *Brady* case, the question then becomes whether the government's failure to produce the favorable information prejudiced the defendant. As the Seventh Circuit held in *Williamson v. Moore*, "For prejudice to exist we must find that the evidence—although itself inadmissible—would have led the defense to some admissible evidence."⁷³

By contrast, information that would not reasonably lead to admissible evidence need not be produced under *Brady*. For example, in *Wood v. Bartholomew*,⁷⁴ the Supreme Court held in a per curiam opinion that

71. 405 U.S. at 154.

72. For an example of a case where important information was not memorialized in writing, see *United States v. Rodriguez*, 496 F.3d 221 (2d Cir. 2007) (the fact that the government did not make a written record of witness's inconsistent statements does not exempt the government from turning over the information).

73. 221 F.3d 1177, 1183 (11th Cir. 2000).

74. 516 U.S. 1, 5-6 (1995).

under the facts of that case the defendant was not entitled to a new trial on account of the state of Washington's failure to produce negative polygraph results for a witness. The Court's ruling was based in part on the inadmissibility of polygraph results under Washington law, but *Wood* is best understood as a prejudice case—that is, the undisclosed information did not meet the third element of the *Brady* test because it did not undermine confidence in the outcome of the trial.

At least two circuit court cases after *Wood* have held that withheld information need not itself be admissible for a *Brady* violation to have occurred. In *Ellsworth v. Warden, New Hampshire State Prison*,⁷⁵ the defendant had been convicted of sexual assault of a minor. After trial, it was determined that the prosecution had failed to disclose an intake note prepared by the director of the accuser's school that the accuser had raised a similar allegation in the past that turned out to be false. The First Circuit acknowledged that this note was double hearsay, but stated that it is "plain that evidence itself inadmissible could nevertheless be so promising a lead to strong exculpatory evidence that there could be no justification for withholding it." According to the First Circuit, *Wood v. Bartholomew* "explicitly assumed this is so." The First Circuit remanded for inquiry into whether "there exists admissible evidence that [the accuser] made demonstrably false accusations at [his old school] under similar circumstances." If so, a new trial would be required.

In *United States v. Gil*,⁷⁶ the government turned over two boxes of documents just two business days prior to trial. The defendant was convicted, but then it was discovered following trial that an exculpatory memorandum was among the documents in the boxes. The Second Circuit held that the memo was exculpatory and impeaching under *Brady*. Though the memo clearly contained hearsay, and its admissibility remained to be decided on remand, the court was satisfied that the memo could either be admissible in whole or in part, "lead to admissible evidence," or "be an effective tool in disciplining witnesses during cross-examination by refreshment of recollection or otherwise."⁷⁷

75. 333 F.3d 1 (1st Cir. 2003).

76. 297 F.3d 93 (2d Cir. 2002).

77. *Id.* at 104.

* * * * *

In the end, there is really no limit to the types of information that might be considered favorable to the accused. The examples discussed below, in the "materiality" section of this chapter, demonstrate the varied forms that such evidence can take. Any information a conscientious defense lawyer might use to challenge the government's case, including the sentence that may be imposed, qualifies as exculpatory.

2. Suppression by the Government

The "suppression" element, too, is broad. If the government had the favorable evidence and did not provide it, it has been "suppressed." It does not matter why the information was not disclosed.

Most of the controversies regarding this element arise when the information was in the possession of someone in the government other than the prosecutor in the case. Of course, when the prosecutor himself possesses favorable information and does not produce it, the suppression element is satisfied. But information may also be suppressed by the government if it was in the possession of someone else. For example, in *Giglio*, the trial prosecutor claimed that he did not know that an earlier prosecutor who did not try the case had granted informal immunity to the chief government witness. The Court held that the trial prosecutor was charged constructively with this knowledge.⁷⁸ And in *Kyles*, the Court held that prosecutors have a "duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."⁷⁹ Courts also have held that prosecutors must search for witnesses' conviction records in the possession of the FBI and the National Crime Information Center.⁸⁰ Judge Friedman of the District Court for the District of Columbia has held that the duty to search covers all federal agencies, though a "rule of reason" governs where the prosecutor must search.⁸¹ The duty to search also extends

78. 405 U.S. 150.

79. *Kyles*, 514 U.S. at 437.

80. See, e.g., *United States v. Auten*, 632 F.2d 478 (5th Cir. 1980); *United States v. Perdomo*, 929 F.2d 967 (3d Cir. 1991).

81. *United States v. Safavian*, 233 F.R.D. 205, 207 n.1 (D.D.C. 2006).

to state agencies working with federal prosecutors. For example, in a recent case in the Central District of California, a Los Angeles Police detective working with federal prosecutors made promises to witnesses that the court held (and federal authorities agreed) should have been disclosed to the defense by federal prosecutors.⁸²

For purposes of determining whether the second element of a *Brady* violation has been met, the good faith or the bad faith of the prosecutor does not matter.⁸³ If the evidence is in the government's possession (as just described), the prosecutor has a duty to identify it and disclose it.

3. Prejudice to the Defendant: Has Confidence in the Outcome of the Trial Been Undermined?

The third element, prejudice to the defendant, is the one most likely to engender controversy. Several important concepts flow from the Supreme Court cases. After *Kyles*, it is clear that a defendant need not have requested the information to argue that its suppression caused prejudice.⁸⁴ It is also settled that the materiality test does not equate to a "sufficiency of [the] evidence" or a "harmless error" test. A *Brady* error can never be harmless.⁸⁵ The Court should not ask merely whether, after setting aside the suppressed evidence favorable to the accused, there was sufficient evidence to convict.⁸⁶ Nor should a court ask whether the result "more likely than not" would have been different if the *Brady* information had been provided.

Rather the question is this: Has "confidence in the outcome" of the trial been undermined?⁸⁷ This inquiry should be based on the record as

82. Case No. 2:06-cr-00656-SVW, Doc. 997 at 18-46 (9/18/09); *United States v. Brooks*, 966 F.2d 1500, 1503 (D.C. Cir. 1992) (U.S. Attorney's Office must confer with Metropolitan Police Department).

83. *Agurs*, 427 U.S. at 110 ("If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor."). The good faith or bad faith of the prosecutor may have a bearing on whether a remedy above and beyond a new trial is appropriate. See *infra* chapter 10.

84. 514 U.S. at 433-34.

85. *Id.* at 435.

86. *Id.* at 434-35.

87. *Bagley*, 473 U.S. 667; *Kyles*, 514 U.S. 419; *Banks*, 540 U.S. 668.

a whole, not piecemeal on each item of information suppressed.⁸⁸ The standard is fact-intensive and may require the court to do a great deal of work. In a number of cases, as discussed above, the Supreme Court itself undertook a detailed analysis of the factual record.⁸⁹

As is often the case with fact-intensive questions, the results of *Brady* cases in the federal courts are difficult to summarize. Each case has its own facts, and reasonable judges may differ even in deciding a theoretically objective question. We can, however, provide some examples of cases that were decided for and against the defendant.

a. Evidence found to be material.

The Supreme Court has found the following information favorable to the accused and material on the facts presented:

- Benefits provided to a witness by the government, especially agreements not to prosecute.⁹⁰
- Inconsistent statements of a witness.⁹¹
- Evidence that a witness has been coached.⁹²
- Evidence that mitigates punishment.⁹³

The federal circuits and trial courts have also found, again following a fact-specific analysis, that suppression of the following types of information warranted relief under *Brady*:

- Evidence of a witness's negative feelings toward another witness.⁹⁴
- The criminal history of a witness.⁹⁵

88. *Kyles*, 514 U.S. at 436.

89. See *supra* section A.

90. *Giglio*, 405 U.S. 150 (agreement not to prosecute witness); *Bagley*, 473 U.S. 667 (cash reward to witnesses); see also *Douglas v. Workman*, 560 F.3d 1156 (10th Cir. 2009) (per curiam) (government assistance in reducing witness's sentence).

91. *Kyles*, 514 U.S. 419; *Banks*, 540 U.S. 668.

92. *Banks*, 540 U.S. 668.

93. *Brady*, 373 U.S. 83; *Cone*, 129 S. Ct. 1769.

94. *United States v. Sipe*, 388 F.3d 471, 491-92 (5th Cir. 2004).

95. *Id.*

- A therapist's report discussing whether a victim was capable of understanding and consenting to sexual advances, where the capacity to consent was an issue in the case.⁹⁶
- Evidence that a key witness was a drug user, lied to police, and could not be trusted to follow departmental rules.⁹⁷
- A policeman's observations that, if disclosed, would have contradicted the testimony of other witnesses.⁹⁸
- An FBI agent's notes and FBI surveillance tapes that could have been used to impeach government witnesses.⁹⁹
- Evidence of a witness's prior perjury in a related proceeding.¹⁰⁰
- Evidence of a witness's false statements to the FBI.¹⁰¹
- Evidence of other plausible suspects for the crime in question.¹⁰²
- Evidence of attempts by one witness to influence the testimony of another witness.¹⁰³
- An affidavit in support of a search warrant describing the primary witness's suspicious banking activity, secret security guard jobs, and cult membership.¹⁰⁴
- A memorandum from the Drug Enforcement Agency undermining a government witness's integrity.¹⁰⁵
- Reports of ballistics and fingerprint tests indicating that defendant's gun was not the murder weapon and that defendant was not driving the car associated with the crime.¹⁰⁶
- Evidence that the government's case lacked integrity, because the government realized that one of its chief witnesses had not

96. *Bailey v. Rae*, 339 F.3d 1107, 1114-15 (9th Cir. 2003).

97. *Benn v. Lambert*, 283 F.3d 1040, 1054-60 (9th Cir. 2002).

98. *Leka v. Portuondo*, 257 F.3d 89, 104-05 (2d Cir. 2001).

99. *United States v. Pelullo*, 105 F.3d 117, 123 (3d Cir. 1997).

100. *United States v. Cuffie*, 80 F.3d 514, 518 (D.C. Cir. 1996).

101. *United States v. Minsky*, 963 F.2d 870 (6th Cir. 1992).

102. *Bowen v. Maynard*, 799 F.2d 593 (10th Cir. 1986).

103. *United States v. O'Conner*, 64 F.3d 355, 359-60 (8th Cir. 1995) (per curiam).

104. *United States v. Kelly*, 35 F.3d 929, 937 (4th Cir. 1994).

105. *United States v. Brumel-Alvarez*, 991 F.2d 1452, 1458 (9th Cir. 1993).

106. *Barbee v. Warden, Md. Penitentiary*, 331 F.2d 842 (4th Cir. 1964).

been truthful, made that witness a target of its investigation, and decided not to call the witness, but did not tell the defense.¹⁰⁷

In each of the above-cited cases, the court's confidence in the outcome of the trial was undermined, and a new trial was ordered or the case was remanded to the trial court for determination of whether the trial court's confidence in the outcome of the trial was undermined. In some cases, more than one category of favorable evidence was undisclosed. These cases are fact-intensive, and a thorough reading of the case is required to understand why the court's confidence was undermined in a particular case.

b. Evidence found not to be material.

In other cases, however, the Supreme Court and lower federal courts have found that undisclosed evidence did *not* undermine confidence in the outcome of the trial based on the facts in the record. Examples include the following cases:

- Insignificant information about a potential alternative perpetrator and a diagram consistent with the government's case.¹⁰⁸
- The criminal record of a murder victim when it was undisputed that the victim was armed and the evidence of defendant's guilt was overwhelming.¹⁰⁹
- Evidence that a witness failed a polygraph when the polygraph evidence was inadmissible and proof of the defendant's guilt was overwhelming.¹¹⁰
- Inconsistent statements of witnesses when their disclosure would not have made a difference in the face of considerable forensic and physical evidence linking the defendant to the murder.¹¹¹
- Evidence of defendant's injury that was not disputed.¹¹²

107. *United States v. Quinn*, 537 F. Supp. 2d 99 (D.D.C. 2008).

108. *See Moore*, 408 U.S. 786, discussed *supra* section A.3.

109. *See Agurs*, 427 U.S. 97, discussed *supra* section A.3.

110. *See Wood*, 516 U.S. 1, discussed *supra* section A.6.

111. *See Strickler*, 527 U.S. 263, discussed *supra* section A.6.

112. *United States v. Tyndall*, 521 F.3d 877 (8th Cir. 2008).

- A psychiatric report stating a paranoid diagnosis for a non-crucial government witness.¹¹³
- Evidence that a non-crucial witness violated the terms of his cooperation agreement where the court determined that the violation would not have undermined the witness's credibility in the eyes of the jury.¹¹⁴
- Five items, including impeachment information regarding a prosecution witness and a report of a fingerprint test that failed to identify defendant's fingerprints at crime scene, where defense counsel effectively capitalized—in one way or another—on every potentially valuable argument the five items supported, even though the items themselves were unavailable to counsel at the time of trial.¹¹⁵
- Keeping witnesses away from the defense, when the witnesses would not have made any difference in light of the "overwhelming physical evidence" inculcating defendant as the perpetrator.¹¹⁶
- An immunity agreement with a witness regarding a beating the witness perpetrated, where the agreement was truly cumulative because the witness was "heavily impeached" at trial by, among other things, the existence of other charges against him that were dismissed in exchange for his testimony.¹¹⁷
- A prior inconsistent statement of a witness and thirteen polygraph examinations given to another witness, where, at the time of trial, defendant had examples of contradictory statements made by both witnesses and used them to impeach one witness while choosing not to cross-examine the other.¹¹⁸

113. *Zeigler v. Callahan*, 659 F.2d 254 (1st Cir. 1981).

114. *United States v. Spinelli*, 551 F.3d 159 (2d Cir. 2008), cert. denied, 130 S. Ct. 230 (2009).

115. *Kelley v. Sec'y for Dep't of Cor.*, 377 F.3d 1317 (11th Cir. 2004).

116. *Brown v. French*, 147 F.3d 307, 312 (4th Cir. 1998).

117. *Simental v. Matrisciano*, 363 F.3d 607, 614 (7th Cir. 2004).

118. *Moreno-Morales v. United States*, 334 F.3d 140 (1st Cir. 2003).

c. "Cumulative" evidence.

Prosecutors often argue that information did not need to be produced under *Brady* because it was "cumulative" of other evidence. This is not an independent exception to the *Brady* rule. Rather, it is another way of saying that production of the evidence would not have materially affected the trial because it duplicated information that the defendant already had. Information that truly is cumulative would not meet the prejudice element of the *Brady* test.¹¹⁹ But before concluding that a piece of information or evidence is "cumulative," a court should be careful to consider all of the ways the information may have been used at trial.

Relatedly, several courts have also held that the government is not required to produce information it knows the defense already has.¹²⁰ Thus, *Brady* does not relieve the defendant and her counsel from the obligation to review and identify the favorable information already in their possession. But this rule would not necessarily apply where the government has buried *Brady* information in a voluminous production.¹²¹

119. See, e.g., *United States v. Brodie*, 524 F.3d 259, 268–69 (D.C. Cir. 2008).

120. *United States v. Zagari*, 111 F.3d 307, 320 (2d Cir. 1997) ("*Brady* cannot be violated if the defendants had actual knowledge of the relevant information or if the documents are part of public records and 'defense counsel should know of them and fails to obtain them because of lack of diligence in his own investigation.'" (citation omitted)); *United States v. Whitehead*, 176 F.3d 1030, 1036–37 (8th Cir. 1999) ("The government need not disclose evidence that is, inter alia, available through other sources or not in the possession of the prosecutor."); *United States v. Prior*, 546 F.2d 1254, 1259 (5th Cir. 1977) ("[N]umerous cases have ruled that the government is not obliged under *Brady* to furnish a defendant with information which he already has or, with any reasonable diligence, he can obtain himself."); *United States v. Di Giovanni*, 544 F.2d 642, 645 (2d Cir. 1976) ("The government is not required to make a witness' statement known to a defendant who is on notice of the essential facts which would enable him to call the witness and thus take advantage of any exculpatory testimony he might furnish."); *Gantt v. Roe*, 389 F.3d 908 (9th Cir. 2004).

121. See *infra* section E.4.

C. Other Considerations Regarding What Must Be Produced

In addition to the cases discussed above, a number of federal appellate decisions have considered other potential limitations on what must be disclosed under *Brady*. We discuss them below.

1. *Brady* Does Not Require Open File Discovery

For example, if it is not obvious by now, *Brady* does not require open file discovery. That is, *Brady* does not require the government to open all of its files to defense counsel.¹²² Nor does *Brady* give rise to a generalized constitutional right to discovery.¹²³

2. Prosecutors' Work Product

The Supreme Court has not addressed whether a prosecutor's work product must be disclosed under *Brady*.¹²⁴ A number of district courts, however, have held that the work product doctrine does not trump the government's *Brady* obligations.¹²⁵ As Professors Wright and Miller have

122. *Bagley*, 473 U.S. at 675 ("[T]he prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial." (footnote omitted)). As a practical matter, however, it may be prudent for the prosecutor to provide open-file discovery to maximize the likelihood that all exculpatory information will in fact be provided.

123. *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977).

124. *Mincey v. Head*, 206 F.3d 1106, 1133 n.63 (11th Cir. 2000) ("Neither the Supreme Court nor this court has decided whether *Brady* requires a prosecutor to turn over his work product.").

125. See *Castleberry v. Crisp*, 414 F. Supp. 945, 953 (N.D. Okla. 1976) ("[T]he 'work product' discovery rule cannot, of course, be applied in a manner which derogates a defendant's constitutional rights as propounded in *Brady*."); see also *United States v. NYNEX Corp.*, 781 F. Supp. 19, 25 (D.D.C. 1991) ("Cases on this question, albeit without much discussion, suggest that internal materials possibly constituting work product may not automatically be exempt from *Brady* requirements.") (citing cases); *United States v. Goldman*, 439 F. Supp. 337, 350 (S.D.N.Y. 1977) ("Of course, if [work product] material be of a *Brady* nature, then it must be produced.").

summarized, "Because *Brady* is based on the Constitution, it overrides court-made rules of procedure."¹²⁶

Certainly, to the extent that the prosecutor's work product contains exculpatory *facts*, whether those facts relate to the offense or to the government's witnesses, such work product must yield to *Brady*'s constitutional command that such exculpatory information be disclosed. For example, a memorandum reciting what a witness has said about the case may be producible under *Brady*, to the extent the witness's statements are favorable to the defendant—even though the memorandum was written by the prosecutor. On the other hand, a prosecutor's *opinion work product*—her strategies, legal theories, or impressions of the evidence—may deserve different treatment. Of course, if a document containing opinion work product—such as a legal research memorandum, a memorandum evaluating evidence, or notes used to argue in court or to examine a witness—also contains exculpatory facts, those facts should be disclosed. The Ninth Circuit has explained:

The *Brady* rule is not meant to displace the adversary system; the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused, that, if suppressed, would deprive the defendant of a fair trial. Extending the *Brady* rule to opinion work product would greatly impair the government's ability to prepare for trials. Thus, in general, a prosecutor's opinions and mental impressions of the case are not discoverable under *Brady* unless they contain underlying exculpatory facts.¹²⁷

In other words, a prosecutor should be able to prepare her case with some degree of privacy. She need not reveal all of her notes. But, the opinion work product doctrine should not be used to conceal exculpatory *facts* from the defense. In addition, some conclusions—such as the conclusion that an important witness is not giving truthful information,

126. 2 Charles Alan Wright & Peter J. Henning, *Federal Practice and Procedure* § 256, at 162 (4th ed. 2009).

127. *Morris v. Ylst*, 447 F.3d 735, 742 (9th Cir. 2006).

will not be called to testify, and has himself become a target of a government investigation—may also require disclosure under *Brady*.¹²⁸

An example may be instructive on this point: Every defense lawyer would like to have a copy of the government's "pros memo," in which a prosecutor responsible for a case has evaluated the strengths and weaknesses of the case for his supervisors. The entire "pros memo" itself probably does not need to be produced. But any factual information in the "pros memo" that constitutes *Brady* information needs to be disclosed. *Brady* information is not exempt from disclosure merely because it appears within the same document as opinion work product.

3. Confidential Informants

A right to learn the identity of confidential government informants under appropriate circumstances arose even before *Brady*. In 1957, the Supreme Court in *Roviaro v. United States*¹²⁹ held that a generally recognized privilege of a government informant to remain confidential would give way "[w]here the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to the fair determination of a cause." This was, in essence, a precursor to *Brady* and is in fact quite similar to *Brady*. *Roviaro* is discussed in detail in chapter 6.

Surprisingly, the federal appellate courts that discuss the *Roviaro* rule do so without referring to *Brady*. One could argue that, at least in some cases, the *Roviaro* test is more generous to the defense than *Brady*. But in any case where information about a confidential informant satisfies the requirements for *Brady* information, it must of course be produced under *Brady*, even if it somehow would not be producible under *Roviaro*.

D. The Brady Rule at the Trial Court Level

The Supreme Court cases addressing *Brady* all have reviewed *retrospectively* what happened at trial or sentencing. They have attempted to determine whether a trial that has already taken place was fair.

128. See, e.g., *United States v. Quinn*, 537 F. Supp. 2d 99 (D.D.C. 2008).

129. 353 U.S. 53 (1957).

Post-trial, the appellate court's task is to review the trial court record in light of favorable information that was withheld from the defense and to apply a "materiality" analysis to determine whether the government's failure to provide that information undermines confidence in the outcome of the case. A federal district court overseeing a criminal case is confronted with a far different task: ensuring a fair trial going forward.

Few published trial court opinions discuss the scope of a prosecutor's obligation to produce exculpatory information viewed from the *pre-trial* perspective. The courts addressing this issue take a generous view of the prosecutor's *Brady* obligations, on the theory that it is inappropriate to place the prosecutor in a position to decide prior to trial what information may be "material" to a trial that has not yet occurred.

In *United States v. Sudikoff*,¹³⁰ Judge Pregerson of the Central District of California emphasized that trial courts should determine what should be produced to the defense in advance of trial in order to ensure a fair trial, rather than attempting to predict what is likely to be considered "material" by an appellate court after the fact.

[I]n the pretrial context it would be inappropriate to suppress evidence because it seems insufficient to alter a jury's verdict. Further, "[t]he government, where doubt exists as to the usefulness of evidence, should resolve such doubts in favor of full disclosure. . . ." Thus, the government is obligated to disclose all evidence relating to guilt or punishment which might reasonably be considered favorable to the defendant's case.¹³¹

Judge Mahan of the District of Nevada subsequently followed Judge Pregerson in holding that all exculpatory information must be disclosed at the trial court level regardless of whether it might be viewed as material after trial and on appeal.¹³²

130. 36 F. Supp. 2d 1196 (C.D. Cal. 1999).

131. *Id.* at 1199 (alteration in original) (citations and internal quotation marks omitted).

132. *United States v. Acosta*, 357 F. Supp. 2d 1228, 1233 (D. Nev. 2005) (following and citing *Sudikoff*).

Finally, Judge Friedman of the U.S. district court for the District of Columbia recently expanded on the teaching of *Sudikoff* to reach the same conclusion.

The prosecutor cannot be permitted to look at the case pre-trial through the end of the telescope an appellate court would use post-trial. Thus, the government must always produce any potentially exculpatory or otherwise favorable evidence without regard to how the withholding of such evidence might be viewed—with the benefit of hindsight—as affecting the outcome of the trial. The question before trial is not whether the government thinks that disclosure of the information or evidence it is considering withholding might change the outcome of the trial going forward, but whether the evidence is favorable and therefore must be disclosed. Because the definition of “materiality” discussed in *Strickler* and other appellate cases is a standard articulated in the post-conviction context for appellate review, it is not the appropriate one for prosecutors to apply during the pretrial discovery phase. The only question before (and even during) trial is whether the evidence at issue may be “favorable to the accused”; if so, it must be disclosed without regard to whether the failure to disclose it likely would affect the outcome of the upcoming trial.¹³³

The courts’ thoughtful analyses in *Sudikoff*, *Acosta*, and *Safavian* teach that trial courts should order that all information favorable to the defense be produced before trial. And, as the Supreme Court has elsewhere suggested, all doubts should be resolved in favor of full disclosure. Any other rule risks making prosecutors the arbiters of materiality in advance of trial, and courts will be unable to correct any mistakes until a post-trial review of the evidence—assuming the favorable evidence ever is disclosed at all.

133. *United States v. Safavian*, 233 F.R.D. 12, 16–17 (D.D.C. 2005).

E. Common Procedural Considerations

1. Timing of Brady Disclosures

If the *Brady* rule is to have any meaning, favorable information must be disclosed to the defense in time for the defense to use it effectively. In *United States v. Pollack*,¹³⁴ the D.C. Circuit made clear that disclosure of *Brady* information must occur "at such time as to allow the defense to use the favorable material effectively in the preparation and the presentation of its case."¹³⁵

Despite this sensible admonition, some appellate courts have been lenient in this regard, usually finding no *Brady* violation as long as production was made at any time before or during trial.¹³⁶ For example, in *United States v. Woodley*,¹³⁷ the government belatedly produced correspondence helpful to the defense in a tax evasion and fraud case. The Ninth Circuit found that the defense nevertheless was able to use these documents effectively at trial and declined to reverse. Similarly, in *United States v. Warren*,¹³⁸ the defendant claimed in a forgery case that the government was tardy in disclosing that the government considered the defendant to be a confidential informant. The defendant, however, used the admission in his defense, and the Seventh Circuit noted that

134. 534 F.2d 964, 973 (D.C. Cir. 1976).

135. *Id.* at 973. Whether *Brady* information is produced in time is arguably a distinct inquiry from whether the information itself is material. See *United States v. Fallon*, 348 F.3d 248, 252 (7th Cir. 2003) ("Materiality focuses not on trial preparation, but instead on whether earlier disclosure would have created a reasonable doubt of guilt.").

136. *United States v. Sardinias*, 386 F. App'x 927 (11th Cir. 2010), available at 2010 WL 2803393; *United States v. Celestin*, 612 F.3d 14 (1st Cir. 2010); *United States v. Celis*, 608 F.3d 818 (D.C. Cir.), (per curiam), cert. denied, 131 S. Ct. 620 (2010); *United States v. Kimoto*, 588 F.3d 464 (7th Cir. 2009), cert. denied, 130 S. Ct. 2079 (2010); *Thomas v. Lampert*, 349 Fed. App'x 272 (10th Cir. 2009); *United States v. Jeffers*, 570 F.3d 557 (4th Cir. 2009); *United States v. Aleman*, 548 F.3d 1158 (8th Cir. 2008); *United States v. Navarro*, 263 F. App'x 428 (5th Cir. 2008) (per curiam); *United States v. Gordon*, 844 F.2d 1397 (9th Cir. 1988); *United States v. Presser*, 844 F.2d 1275 (6th Cir. 1988); *United States v. Johnson*, 816 F.2d 918 (3d Cir. 1987); *Powell v. Quarterman*, 536 F.3d 325 (5th Cir. 2008), cert. denied, 129 S. Ct. 1617 (2009); *United States v. Warren*, 545 F.3d 752 (7th Cir. 2006).

137. 9 F.3d 774 (9th Cir. 1993).

138. 545 F.3d 752 (7th Cir. 2006).

the defendant was unable to demonstrate that he would have done anything differently at trial if he had received the information earlier.

While it may be that in some cases a defendant is not prejudiced by late production, courts should be careful not to discount the time needed for conscientious defense counsel to investigate a case and prepare for trial. It is difficult for defense counsel to shift strategy on a dime when new information is provided shortly before trial or during trial. And asking for a continuance right before trial (especially if the defendant is incarcerated) or during trial after a jury has been impaneled are hardly viable options. In the first instance, defense counsel must sacrifice a client's freedom and speedy trial rights in order to vindicate her client's right to receive meaningful information. In the second instance, defense counsel runs the risk of antagonizing the jury, which may have already formed a view of the case without the benefit of the favorable information belatedly disclosed to the defense. Giving such jurors time off for their views to harden is not a good solution to untimely disclosure.

A few appellate decisions in recent years have cut against this trend and accorded greater recognition to the practical difficulties presented by late disclosure. In *Leka v. Portuondo*,¹³⁹ the government disclosed a mere nine days before trial that a police officer who witnessed the crime contradicted the account of events provided by other eyewitnesses who implicated the defendant. The government argued that the disclosure was early enough to permit the defense to learn all that it needed to know. The Second Circuit disagreed, holding that "the disclosure was too little too late." The court noted that it was "not feasible or desirable to specify the extent or timing of disclosure [of] *Brady*" information, but went on to say that the amount of time the prosecutor withholds information, and the amount of time the disclosure is made before trial are "relevant considerations."¹⁴⁰ "The opportunity for use under *Brady*," the court said, "is the opportunity for a responsible lawyer to use the information with some degree of calculation and forethought."¹⁴¹

139. 257 F.3d 89 (2d Cir. 2001).

140. *Id.* at 103.

141. *Id.*

Similarly, in *DiSimone v. Phillips*,¹⁴² the Second Circuit considered a petition for habeas corpus relief on the theory that the state of New York had violated *Brady* by not disclosing until near the close of the prosecution's case information that another person other than the defendant had stabbed the victim before the defendant allegedly did so. "The more a piece of evidence is valuable and rich . . . the less likely it will be that late disclosure provides the defense an opportunity for use."¹⁴³

Most recently, in *Miller v. United States*,¹⁴⁴ the District of Columbia Court of Appeals reversed a criminal conviction where the government produced *Brady* information prior to trial, but not in sufficient time for the defense to fully understand its significance. Thus the defense did not realize until too late that evidence of a witness's left-handedness supported an alternative theory that he, and not the defendant, was the culprit.

The Tenth Circuit in *United States v. Burke*¹⁴⁵ aptly stated that "[i]t would eviscerate the purpose of the *Brady* rule and encourage gamesmanship were we to allow the government to postpone disclosures to the last minute, during trial." Following the Second Circuit's reasoning in *Leka*, the court observed:

[B]elated disclosure of *Brady* material "tend[s] to throw existing strategies and [trial] preparation into disarray." It becomes "difficult [to] assimilate new information, however favorable, when a trial already has been prepared on the basis of the best opportunities and choices then available."¹⁴⁶

The court also explained the "dangerous incentives" that courts would create for prosecutors by condoning late production of *Brady* material.

142. 461 F.3d 181 (2d Cir. 2006).

143. *Id.* at 197 (internal quotation marks omitted). The Second Circuit remanded the case for the trial court to determine whether defense counsel should have known this information.

144. No. 07-CF-1169 (D.C. Mar. 3, 2011).

145. 571 F.3d 1048, 1054 (10th Cir.), *cert. denied*, 130 S. Ct. 565 (2009).

146. *Id.* (quoting *Leka*, 257 F.3d at 101 and citing *United States v. Devin*, 918 F.2d 280, 290 (1st Cir. 1990) (explaining that a *Brady* violation would occur if delayed disclosure altered defense strategy and timely disclosure would likely have resulted in a more effective strategy)).

Prosecutors could then "withhold impeachment or exculpatory information until after the defense has committed itself to a particular strategy during opening statements or until it is too late for the defense to effectively use the disclosed information."¹⁴⁷

It is not hard to imagine the many circumstances in which the belated revelation of *Brady* material might meaningfully alter a defendant's choices before and during trial: how to apportion time and resources to various theories when investigating the case, whether the defendant should testify, whether to focus the jury's attention on this or that defense, and so on. To force the defendant to bear these costs without recourse would offend the notion of fair trial that underlies the *Brady* principle.¹⁴⁸

On the facts presented in *Burke*, the court determined that the defendant had not demonstrated how the delayed disclosure materially prejudiced his case. But *Burke* remains an excellent summary of why the timing of *Brady* disclosures matters.

In an effort to prevent eleventh-hour disclosures, courts often require that *Brady* information be produced prior to trial, by a fixed deadline. Any late production by the government therefore violates a court order and can be sanctioned even if the Constitution would not otherwise require it. Similarly, many districts have established local rules setting deadlines for pretrial disclosure of *Brady* information. Such deadlines should be encouraged, as late production of favorable information can be disruptive to the trial and devastating to the defense.

2. Form of *Brady* Disclosures

Courts have rarely addressed, at least in published opinions, the form in which *Brady* disclosures should be provided to the defense. Some prosecutors disclose *Brady* information in the form of a letter to defense counsel. For example, the prosecutor may write something like: "Please be advised that in an interview on March 10, 2010, witness John Doe

¹⁴⁷. *Id.* at 1054.

¹⁴⁸. *Id.*

described a version of events that is inconsistent with his anticipated trial testimony."

Even assuming the letter contained all relevant details about the witness's inconsistent statement (which this example obviously does not), such a letter does not provide information in a format readily usable by defense counsel. Defense counsel will need to cross-examine the witness by confronting him with his earlier inconsistent statement.¹⁴⁹ If the witness does not admit to the prior inconsistent statement, defense counsel will need to call an agent who was present at the interview to elicit evidence of the prior inconsistent statement. It is very difficult for the defense lawyer to impeach the witness with a summary letter from the prosecutor. Rather, if a memorandum of the interview or another contemporaneous record of the statement exists (as it should), that document should be provided to defense counsel.

Judge Sullivan of the U.S. district court for the District of Columbia has said that summary letters are an "opportunity for mischief and mistake."¹⁵⁰ Judge Harold Green of the same court wrote this before the trial of Admiral John Poindexter, when the Iran Contra Independent Counsel's Office insisted that it could produce summaries of documents instead of the documents themselves:

The Government is unable to cite a single decision in which a summary of the exculpatory information has been held sufficient to meet its *Brady* obligations. On the contrary, it is clear that the common practice is . . . to produce the documents themselves.¹⁵¹

149. See Fed. R. Evid. 613(b) ("Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).").

150. See *United States v. Stevens*, No. 1:08-cr-231-EGS Doc. 373 (4/7/2009 Hr'g Tr.) at 9.

151. *United States v. Poindexter*, No. 88-0080, 1990 U.S. Dist. Lexis 2023, at *1-2 (D.D.C. Mar. 5, 1990).

This is as it should be. If *Brady* is to be meaningful, the information provided to the defense must be in a format that is readily usable by the defense. The summary letter is the most common manifestation of the "unusable format" problem we have seen, but one can imagine other scenarios where some degree of information is disclosed, but not in a way that defense counsel can make use of it at trial. All participants in the process must remain on guard that *Brady* information is provided in a format that is in fact usable by the defense.

3. In Camera Review of Potential *Brady* Information

Trial courts sometimes review government materials in camera before they are produced to the defendant, to determine whether they contain *Brady* information. This process should be used sparingly, if ever, for a number of reasons. First, in camera review consumes tremendous judicial resources. Second, the trial court (through no fault of its own) may not grasp what would be helpful to the defense. Third, in camera review makes for an inefficient and in some cases unworkable appellate record. Appellate courts are ill-equipped to review what the trial court did in camera. Fourth, in camera review runs contrary to the presumption in favor of the public's right to access to judicial proceedings and records.¹⁵² Fifth, often little is gained by in camera review. If there is a serious question over whether the information should be turned over to the defense, why not simply turn it over?

Nevertheless, there may be some occasions where in camera review of potential *Brady* material is appropriate. Sometimes, indeed, it may be legally required. For example, the Classified Information Procedures Act requires that the court review in camera potentially discoverable documents containing classified information relating to national security.¹⁵³ There may also be occasions where extreme privacy issues are implicated. For example, courts sometimes conduct in camera review of

152. See, e.g., *United States v. Wecht*, 484 F.3d 194, 207-08 (3d Cir. 2007) ("[I]t is well-settled that there exists, in both criminal and civil cases, a common law public right of access to judicial proceedings and records.").

153. See *infra* chapter 9 section B for a discussion of CIPA. Also, Rule 26.2 expressly requires in camera review of potential witness statements in some circumstances. See *infra* chapter 3.

witnesses' medical records or Presentence Reports to determine whether they contain information favorable to the defense.

Defense counsel sometimes seek in camera review when they perceive no other way of getting access to certain materials. Appellate courts have sometimes found reversible error when the trial courts failed to order disclosure in reliance on government representations that the materials did not contain *Brady* information, without first conducting in camera review.¹⁵⁴

4. Identifying Material Exculpatory Information Within a Larger Production

Some prosecutors make large volumes of material available to the defense. Such discovery practices run the risk of overwhelming defense counsel with information of little or no use. The possibility of producing large quantities of computer-generated data increases this risk. When prosecutors provide large quantities of data, must they identify the information within that production that meets the elements of *Brady*?

The leading case on this developing issue is *United States v. Skilling*,¹⁵⁵ in which the Fifth Circuit found no *Brady* violation when the government produced several hundred million pages of documents to the defense. The court in *Skilling* was careful to rest its holding on the facts presented, and particularly on its finding that there was no evidence that the government knew of *Brady* information that it hid from the defense. The Fifth Circuit found it significant that the file

was electronic and searchable. The government produced a set of "hot documents" that it thought were important to its case or were potentially relevant to [the] defense. The government provided indices to these and other documents. The government

154. E.g., *United States v. King*, 474 F.3d 693 (4th Cir. 2011); *United States v. Garcia*, 562 F.3d 947 (8th Cir. 2009) (reversible error not to review Presentence Investigation Reports for *Brady* information in camera); *United States v. Alvarez*, 358 F.3d 1194 (9th Cir. 2004) (same); *United States v. Gaston*, 608 F.2d 607 (5th Cir. 1979) (reversible error not to review interview memoranda for *Brady* information in camera).

155. 554 F.3d 529, 577 (5th Cir. 2009), *rev'd on other grounds*, 130 S. Ct. 2896 (2010).

also provided Skilling with access to various databases . . . , [and] there is no evidence that the government found something exculpatory but hid it in the open file with the hope that [the defendant] would never find it.

Even so, the court emphasized that it was not stating a bright-line rule that *Brady* condones burying favorable information. On the contrary, the court strongly suggested that *Brady* limits the manner in which the government produces its discovery.

We do not hold that the use of a voluminous open file can never violate *Brady*. For instance, evidence that the government “padded” an open file with pointless or superfluous information to frustrate a defendant’s review of the file might raise serious *Brady* issues. Creating a voluminous file that’s unduly onerous to access might raise similar concerns. And it should go without saying that the government may not hide *Brady* material of which it is actually aware in a huge open file in the hope that the defendant will never find it.¹⁵⁶

5. Disclosing *Brady* Information Before a Guilty Plea

After *United States v. Ruiz*,¹⁵⁷ the law is now settled that due process does not require the prosecution to disclose favorable impeachment evidence or evidence regarding affirmative defenses to the defendant before the defendant enters a guilty plea. Whether or not other *Brady* information must be disclosed before the defendant enters a guilty plea is an open question.

In *Ruiz*, the prosecution represented to the defendant prior to a guilty plea that it had disclosed “any [known] information establishing the factual innocence of the defendant,” while acknowledging a “continuing duty to provide such information.”¹⁵⁸ The Ninth Circuit held that the government had a similar duty to disclose exculpatory impeachment

¹⁵⁶. *Id.*

¹⁵⁷. 536 U.S. 622 (2002).

¹⁵⁸. *Id.* at 625 (alteration in original) (quotation marks omitted).

evidence. The Supreme Court reversed, holding that a defendant may waive his or her right to have favorable impeachment evidence disclosed prior to entry of plea.¹⁵⁹ If a defendant makes the decision to waive this right, she cannot later complain on that basis about her decision to plead guilty. The Court reached the same conclusion with respect to evidence regarding affirmative defenses.¹⁶⁰ The Court did not address whether other exculpatory information must be disclosed before a guilty plea, and indeed, the government's proposed plea agreement in *Ruiz* already contemplated such a duty.¹⁶¹ Justice Thomas concurred in the judgment in *Ruiz*, apparently on the ground that he saw no right to insist on disclosure of any kind of evidence at the plea stage.¹⁶²

The Court's decision in *Ruiz* was based in part on the idea that waiving the right to receive impeachment information is no different in principle than waiving any number of other rights that a defendant forgoes when entering a plea of guilty, such as the right to a trial by jury. Under this thinking, one can easily imagine the Supreme Court extending its holding from *Ruiz* to exculpatory evidence beyond favorable impeachment evidence. The Supreme Court, after all, has rejected a distinction between so-called exculpatory evidence and so-called impeachment evidence in other contexts.¹⁶³

On the other hand, the Court also based its ruling in part on the notion that impeachment information may or may not be helpful to the defendant at the plea stage.¹⁶⁴ This suggests that the Court might reach a different result if presented with other information that it viewed as more fundamental to the defendant's plea decision. This was the basis of Justice Thomas's disagreement with the majority in *Ruiz*.

The federal circuits have reached divergent results in the wake of *Ruiz*. Some have suggested that the distinction between "exculpatory" and "impeachment" evidence is critically important in the context of guilty pleas. The Seventh Circuit has said in dicta:

159. *Id.* at 628-33.

160. *Id.* at 633.

161. *See id.* at 625, 631.

162. *Id.* at 633-34 (Thomas, J., concurring in the judgment).

163. *Bagley*, 473 U.S. at 676.

164. *See* 536 U.S. at 630.

Ruiz indicates a significant distinction between impeachment information and exculpatory evidence of actual innocence. Given this distinction, it is highly likely that the Supreme Court would find a violation of the Due Process Clause if prosecutors or other relevant government actors have knowledge of a criminal defendant's factual innocence but fail to disclose such information to a defendant before he enters into a guilty plea.¹⁶⁵

In addition, the First Circuit has held that government's failure to disclose evidence of its witness manipulation rendered a defendant's guilty plea invalid.¹⁶⁶

On the other hand, the Fifth and Eighth Circuits fail to see the distinction between impeachment and exculpatory evidence in the context of plea agreements.¹⁶⁷ And the Second Circuit has recognized that the issue remains unresolved.¹⁶⁸

165. *McCann v. Mangialardi*, 337 F.3d 782, 788 (7th Cir. 2003).

166. *Ferrara v. United States*, 456 F.3d 278 (1st Cir. 2006).

167. *United States v. Tucker*, 419 F.3d 719, 721 (8th Cir. 2005); *United States v. Conroy*, 567 F.3d 174, 179 (5th Cir. 2009) (per curiam), *cert. denied*, 130 S. Ct. 1502 (2010).

168. *See, e.g., Friedman v. Rehal*, 618 F.3d 142, 154 n.4 (2d Cir. 2010) ("[I]t is unclear whether *Ruiz* overrules all of the Second Circuit precedent in this area or whether the Second Circuit's recognition of a right to disclosure of purely exculpatory information prior to a guilty plea survives." (internal quotation marks omitted)).